

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matters of)
)
Imposition of Forfeiture Against)
)
Capitol Radiotelephone Inc.)
d.b.a. Capitol Paging)
Former Licensee of Station WNSX-646)
in the Private Land Mobile Radio)
Services)

PR Docket No. 93-231

and)

Revocation of Licenses of)
)
Capitol Radio Telephone Inc.)
d.b.a. Capitol Paging)
Licensee of Stations WNDA-400 and)
WNWW-636 in the Private Land Mobile)
Radio Services)

and)

Capitol Radiotelephone Company, Inc.)
Licensee of Stations KWU-373,)
KUS-223 and KWU-204 in the)
Public Mobile Radio Service)

and)

Capitol Radiotelephone Co., Inc.)
Licensee of Station KQD-614 in the)
Public Mobile Radio Service)

To: Administrative Law Judge Joseph Chachkin

PRIVATE RADIO BUREAU'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

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Summary

The findings and conclusions compel the revocation of all of Capitol's licenses and a \$95,000 forfeiture. Faced with competition in its paging business in Charleston, WV, Capitol fought back by engaging in conduct specifically discountenanced by the Commission's Rules. When RAM Technologies opened a paging business in Capitol's service area, Capitol devised, carried out, and tried to cover up an illicit business plan -- to use radio interference to disrupt RAM's business and drive paging customers away from RAM and toward Capitol. In aid of this scheme Capitol threw up a smokescreen of misrepresentation and evasiveness.

Capitol obtained a Private Carrier Paging (PCP) license on the same frequency as RAM and then clogged the shared frequency with interference in various forms for almost three years -- from the time it went on the air until it finally turned its borrowed 100 and 76 watt transmitters off. At far lower power than the authorized 350 watts, the transmitters were inadequate to provide service to real customers, but sufficient to cause interference to RAM. Indeed, the record shows that Capitol had virtually no customers.

Capitol's misrepresentations and evasiveness started with obtaining a Commission license to cloak its interference with legitimacy. Soon RAM complained that retransmissions from Capitol's Public Mobile Radio Service (RCC) paging station were interfering with its pages. Capitol denied causing the interference and suggested RAM had staged the incident.

Months later, after more complaints, Commission engineers found Capitol transmitting intentional interference around the clock in the form of endless "tests." Even its Morse code identification (ID) was far too slow, and obviously designed to consume as much air time as possible. Capitol had on its books about three PCP customers with one pager each. Capitol responded to the engineers' questions concerning the "tests" and its customers with obfuscation and misrepresentations.

When the Commission sought to investigate further, Capitol continued to stonewall with claims that its PCP station was a real business and to be evasive and untruthful about the "testing," which it had prudently discontinued. After the Commission sent Capitol a \$20,000 Notice of Apparent Liability, Capitol finally discontinued the slow ID but boldly resumed the interference in a new and more sophisticated form of retransmissions from its RCC frequency. At the hearing Capitol continued and expanded its untruthfulness concerning the testing and customers and evinced an ignorance of the retransmissions that was not worthy of belief.

Intentional interference is a most serious violation. Even a single instance is grounds for revocation. It is despicable as a method of business competition. During this proceeding Capitol surrendered the PCP authorization that it misused, but it is essential to revoke Capitol's remaining licenses under which it operates the very paging business it sought to benefit. Its other operating violations make the case against it even stronger

and emphasize the wilfulness and malice of its interference.

Capitol's lack of candor and misrepresentations are an independent basis for revoking all its licenses. Capitol's deceit is particularly serious because it is related directly to Capitol's contemptible scheme of obtaining and using a PCP station solely to disrupt its competitor's business. The scheme was, in fact, doubly contemptible because it precluded members of the public from utilizing a service for which they had paid and was designed to remove the opportunity for such persons to choose between competing services.

The illicit and bizarre business plan of competition by radio interference that Capitol dreamed up, implemented and strove to cover up warrants no less than revocation of all of Capitol's licenses and the imposition of \$95,000 in forfeitures.

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**PRIVATE RADIO BUREAU'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Preliminary Statement

1. Capitol¹ is the licensee of the above captioned public mobile radio service stations and was the licensee or applicant for private carrier paging (PCP) station WNSX-646 and associated private land mobile stations WNDA-400 and WNWW-636.² The Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing (HDO), 8 FCC Rcd 6300 (1993), specified the following issues:

a. Whether, during the month of October 1990, from November 15, 1990 through November 18, 1990, on March 4, 1991, on March 19, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.

b. Whether, on August 12, 13, 14, and 15, 1991, in

¹ The above-captioned corporate licenses are collectively referred to as "Capitol."

² Capitol's license for PCP station WNSX-646 was granted on September 12, 1990. The grant was subsequently set aside and the application returned to pending status. Capitol's request to dismiss the application was granted by Memorandum Opinion and Order, FCC 93M-763, released Dec. 22, 1993. WNDA-400 and WNWW-636 are licenses for a frequency used as a link between the PCP station's transmitter sites in Charleston and Huntington (Cap. Ex. 15, pp. 4-6; Tr. 1029-31). Capitol's failure to request their cancellation along with WNSX-646 was evidently an oversight. At any rate they cancelled automatically, pursuant to Section 90.157(a) of the Rules, which provides, "The license for a station shall cancel automatically upon permanent discontinuance of operations and the licensee shall forward the station license to the Commission...."

light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.

c. Whether, from November 15, 1990 through November 18, 1990, on March 4, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).

d. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).

e. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. willfully and/or repeatedly caused private land mobile radio station WNSX-646 to identify its transmissions by Morse code at a rate less than 20-25 words per minute, in violation of Section 90.425(b)(2) of the Commission's Rules, 47 C.F.R. § 90.425(b)(2).

f. Whether from November 15, 1990 through November 18, 1990 Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b)

of the Commission's Rules, 47 C.F.R. § 90.415(b).

g. Whether, beginning on or about August 27, 1992 and continuing to the present, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc. d.b.a. Capitol Paging, Capitol Radiotelephone Company Inc., and Capitol Radiotelephone Co., Inc. caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b) of the Commission's Rules, 47 C.F.R. § 90.415(b).

h. Whether in written and/or oral statements to the Commission or its staff with respect to the above matters, Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.) Inc., and/or any of these entities doing business as Capitol Paging misrepresented facts to the Commission and/or was lacking in candor.

i. Whether, in light of the findings under paragraph (h), any of the above captioned applicants/licensees willfully or repeatedly violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

j. In light of the findings under paragraphs (a) through (i), whether Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.), Inc., and/or any of these entities doing business as Capitol Paging have the requisite basic character qualifications to continue to remain Commission licensees.

k. In light of the findings under paragraphs (a) through (j), whether Capitol Radiotelephone Inc., Capitol Radio Telephone Inc., Capitol Radiotelephone Company (Co.), Inc., and/or any of these entities doing business as Capitol Paging are qualified to retain each of their respective licenses set forth in the caption of this proceeding.

l. In light of the findings under paragraphs (a) through (k), whether any or all of the captioned radio station licenses should be revoked.

m. In light of the findings under paragraphs (a) through (l), whether Capitol Radiotelephone Inc. d.b.a. Capitol Paging filed an application for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) primarily for the purpose of obtaining a license in order to cause harmful interference to station WNJN-621 licensed to RAM Technologies Inc.

n. In light of the findings under paragraphs (a) through (m), whether the application of Capitol Radiotelephone Inc. d.b.a. Capitol Paging for a private carrier paging facility on the frequency 152.480 MHz in Huntington/Charleston, West Virginia (File No. 0190207) should be granted.³

2. The HDO placed the burden of proceeding and the burden of proof on the Private Radio Bureau (PRB) with respect to all the issues except for the now deleted issue n. Thus, the proceeding now encompasses the revocation of Capitol's licenses and two forfeitures:⁴ a \$20,000 forfeiture proposed in a July 30, 1992, Notice of Apparent Liability (NAL) (PRB Ex. 12) and a \$75,000 forfeiture proposed in the HDO. The \$20,000 forfeiture is to be decided on the basis of the violations specified in the NAL,⁵ which are issues b, d and e; and the \$75,000 forfeiture, on the basis of issue g.⁶

3. The prehearing conference was held on October 29, 1993, and the hearing was held on February 1, 2, 3, 4, 7, 8 and 9, 1994. The record was closed at the conclusion of the hearing on February 9. Order, FCC 94M-68, released Feb. 14, 1994.

³ Issue (n) was deleted in light of the dismissal of Capitol's application. Memorandum Opinion and Order, FCC 93M-763, released Dec. 22, 1993.

⁴ Para. 23 of the HDO, 8 FCC Rcd at 6305.

⁵ id.

⁶ id.

Findings of Fact

Paging Stations

4. Capitol, the respondent in this proceeding, and RAM Technologies, Inc. (RAM), the complainant, are in the paging business and compete for the same customers in Charleston and Huntington, WV (Tr. 822, 833, 836). Capitol's paging business is conducted under the Public Mobile Radio Service (or Radio Common Carrier [RCC]) licenses that are the subject of this proceeding (Cap. Ex. 1, pp. 1-2; Tr. 1418-9). RAM's main paging business is operated on Private Land Mobile Radio Service PCP stations (Tr. 107; FCC database [official notice requested]).

5. The chief difference between an RCC paging station and a PCP station is that the RCC station operates on an exclusive channel assignment in its geographic area, while the PCP station operates on a shared frequency,⁷ where there can be multiple users (Tr. 69). The same equipment is used for both, and from a technical standpoint they are virtually identical (Tr. 1063-4).⁸

⁷ See Section 90.173(a) of the Rules.

⁸ The Commission has regulated RCCs and PCPs differently, for historical reasons, under Parts 22 and 90 of the Rules, respectively. The now artificial distinction is changing. The recently adopted Second Report and Order in GN Docket No. 93-252, FCC 94-31 (released March 7, 1994) implements new legislation intended to treat similar mobile services similarly. Inter alia it classifies mobile services as "commercial mobile radio services" and "private mobile radio services." PCP and RCC paging stations are both classified as commercial mobile radio services. The Commission observed, "there are no longer any real differences between private carrier and common carrier paging systems." id. at p. 43, para. 97.

6. Stations on shared channels have to cooperate to avoid interference. For example, they must monitor the shared frequency before transmitting.⁹ The simplest way to monitor is a radio receiver tuned to the shared channel that automatically signals its own station not to transmit when the channel is busy. The monitor receiver is referred to by several terms: inhibitor, channel monitor and busy monitor (Cap. Ex. 1, p. 11; Cap. Ex. 23, p. 10; Tr. 103, 507-8). It is also possible to use a wireline (telephone line) connection between shared licensees' terminals or to negotiate what part of the minute each shared licensee will have (Tr. 509-11, 1104). It goes without saying that no interference problem can be solved without cooperation, however grudging. See O'Brien, How to share frequencies for private carrier paging, Mobile Radio Technology, August 1991, 72 [official notice requested].

7. Capitol's RCC station KQD-614 is licensed on 152.510 MHz and other frequencies at various sites in Charleston and Huntington and elsewhere in West Virginia (FCC database). It has over 10,000 pagers in operation with over 2,900 customers, up from about 2,800 pagers at the beginning of 1990 (Cap. Ex. 1, p. 3; Tr. 831-2).

8. RAM's PCP station WNJN-621 is licensed on 152.480 MHz at several sites in Charleston, Huntington and other locations (Tr. 107; FCC database). During the time of the violations Capitol was the licensee of or applicant for PCP station WNSX-646 also on

⁹ See Sections 90.173(b) and 90.403(e) of the Rules.

152.480 MHz at two sites in Charleston and Huntington, WV (Cap. Ex. 15). Capitol had advertisements for its RCC service that denigrated PCP service but then filed its application for PCP station WNSX-646, at which the violations at issue in this proceeding occurred (Tr. 70-1, 847-8, 854-5, 858-61).

9. J. Michael ("Mike") Raymond is Capitol's Chief Operating Officer and has supervised all of the services Capitol provides since joining the company in February 1989 (Cap. Ex. 1, p. 1). He conceived of Capitol's PCP station and supervised and managed its implementation (Cap. Ex. 1, p. 2). Russell ("Rusty") Harrison has been manager of Capitol's Huntington office since that office opened in March 1989 (Cap. Ex. 22, p. 1).

10. RAM is Robert A. Moyer's company (Tr. 68). He has been in the paging business for about 25 years (Tr. 86). Dale Capehart is a vice president in charge of technical equipment sales and marketing and has been employed by RAM for 8 years (Tr. 277). Raymond Bobbitt is a senior vice president whose duties are to oversee the company's technical systems. He has been employed by RAM for 12 years (Tr. 466).

11. Paging transmissions can be analog or digital.¹⁰ Paging receivers (pagers) can be digital display, alpha-numeric, tone and voice or tone only. Paging companies may provide a mix of these formats depending on customer requirements (Tr. 523, 872).

12. The paging terminal is a computer which is the brains

¹⁰ See Section 90.207 of the Rules.

of a paging operation (Tr. 479). It has a video screen ("CRT") to display information and a keyboard to program commands into it (Tr. 479). The paging terminal receives incoming messages, batches pages of like format destined for the same frequency and causes them to be transmitted (Tr. 520). It has a storage capacity (or memory or buffer) for pages awaiting transmission (Tr. 529-30). Capitol used the same terminal, located in Charleston, for its RCC and PCP paging operations by adding an additional "channel card" (Cap. Ex. 1, p. 11). A subsidiary terminal or "concentrator" in Huntington sends pages initiated in Huntington to the paging terminal in Charleston (Tr. 1023).

13. A paging company buys a block of sequential phone numbers from the telephone company and gives each customer a number for his pager. The last four digits of the phone number are entered into the paging terminal as the "subscriber number" (Tr. 428, 700). Each pager also has an individual "cap code," which is associated with the subscriber number and other information concerning the pager in the terminal (Tr. 429).

14. To place a page a caller dials the seven digit phone number. His call goes to the phone company office, which routes the last four digits to the paging terminal (Tr. 428). The paging terminal looks in its database to find the cap code, the type of pager (digital display, tone and voice, etc.), the channel and other information concerning the pager the caller is trying to reach (Tr. 429). When the page is transmitted, the cap code comes first and alerts that individual pager to receive the

message which follows (Tr. 292).

15. Various functions can be programmed into the paging terminal, for example chaining (Tr. 430-3, 1002-4). Through a menu displayed on the CRT, commands are entered to chain one subscriber number to one or more additional subscriber numbers (Tr. 430-3, 1003-4). When the first number is dialed the page goes out to that number and then sequentially to all the numbers that are chained to it (Tr. 433, 1004). A volunteer fire department might use chaining so it could alert 12 volunteers by dialing one number (Tr. 495). Chaining is also referred to as "group call" (Cap. Ex. 22, pp. 2-4; Tr. 697, 1332-3).

FCC Monitoring and Inspection of Capitol

16. James G. Walker is an engineer employed at the Commission's Baltimore Field Office (Tr. 108). He has been employed as an engineer at the Commission since 1976 and has a Bachelor of Science degree in Electrical Engineering (Tr. 108). His duties include enforcement of radio-related rules and resolution of interference problems (Tr. 108-9).

17. Donald W. Bogert is an engineer employed at the Commission's Baltimore Field Office (Tr. 252). He has been employed as an engineer at the Commission since 1969 and has a B.S. degree in electrical engineering (Tr. 252). His duties also include enforcement of the Communications Act and FCC rules and resolution of interference complaints (Tr. 252).

18. During 1991 RAM and Capitol each complained to Walker that the other was causing interference on their shared frequency

(PRB Ex. 3, p. 1; Tr. 109). He told them they had to share the channel, to work it out (PRB Ex. 3, p. 1; Tr. 109). They continued to call, and during the week of August 12, 1991, Walker and Bogert traveled to West Virginia and monitored and inspected the stations (PRB Ex. 3, p. 1; Tr. 109, 111-132, 252-8). RAM's complaints about Capitol were known to Capitol (PRB Ex. 3, p. 1; Cap. Ex. 1, pp. 10-12; Cap. Exs. 2, 3, 4, 5, 7, 8, 9, 11, 12, 13; Tr. 281, 289-90, 679, 1345-8, 1017, 1414-5).

19. On Monday, August 12, Walker and Bogert, in separate vehicles located near RAM's and Capitol's transmitter sites, respectively, monitored 152.480 MHz (Tr. 111-2, 252). They observed transmissions, which they conclusively traced to Capitol, that consisted of a repeated sequence of the same tones with no message (PRB Ex. 3, pp. 2, 4; Tr. 112-4, 252-5). They never heard Capitol transmit anything but that same sequence of tones (Tr. 139, 254). At times Capitol started transmitting the tones while RAM was transmitting on the frequency (PRB Ex. 3, pp. 1, 2; Tr. 275).¹¹ On Tuesday they returned to the vicinity of

¹¹ The engineers also observed instances of RAM's commencing to transmit its paging messages while Capitol was transmitting tones. On inspecting RAM's station they learned it was using a device that would transmit if the frequency was clear or wait up to two minutes if Capitol's tones were on the frequency. The Commission issued a warning letter (Cap. Ex. 25) to RAM on July 30, 1992, stating that the use of this device would constitute willful interference to legitimate communications of another licensee and that continued use would subject it to more severe sanctions. The Commission declined to impose a more severe sanction at that time, however, because any interference caused was to transmissions that appeared to be primarily for the purpose of obstructing RAM's communications (id.).

RAM's and Capitol's sites to repeat the procedure they used on Monday (Tr. 252).

20. Whenever the engineers were in the car during the week, they listened to 152.480 MHz and always heard the tones, whether morning, noon or night, as late as midnight (Tr. 114, 136-7, 255-6, 1338-42). The tones were being transmitted all night as well, since according to what the engineers were told at the inspection, someone would have had to enter the Huntington office during the night to turn them off (Tr. 1438-42, 1458-9). The engineers heard the tones as they drove up to Capitol's premises for the inspection (Tr. 115, 255-6). The tones ceased abruptly during the inspection and were not heard again (PRB Ex. 3, p. 3; Tr. 256, 275, 258, 290-1, 1442).

21. The duration of each tone seemed too long, based on Walker's previous experience in monitoring (Tr. 112). When asked whether he had ever heard testing that went on for so long, Walker replied that he did not deem what he heard to be testing. He had never heard testing of such duration (Tr. 137-8, 1443, 1463).

22. When they arrived for the inspection the engineers introduced themselves to Dan Stone (PRB Ex. 3, p. 3). Dan Stone is the president of Capitol, and, with his family, owns it (Tr. 820). The engineers asked Stone about the tones and he said they were range testing for a new control link. When they questioned this, he said they were testing to determine coverage of the paging system (PRB Ex. 3, p. 3). When asked if anyone was in the

field to receive the tests, he replied "yes" but could not identify anyone (PRB Ex. 3, p. 3; Tr. 142, 1445). He said that Mike Raymond, the general manager, could provide details (PRB Ex. 3, p. 3). He asked Bob Wilson, the office manager, to assist them and left the room (PRB Ex. 3, p. 3).

23. The engineers began looking at the programmed parameters of the paging terminal and found that there was a test pager number programmed into the Charleston terminal, but the test function was disabled (PRB Ex. 3, p. 3). Stone returned when they were accessing the terminal to look at the test set up (PRB Ex. 3, p. 3; Tr. 116, 1445). They viewed the recent activity function on the terminal and noted several groups of pages were sent (PRB Ex. 3, p. 3; Tr. 1445). Wilson advised that the groups of pages originated from a second terminal in Huntington (PRB Ex. 3, p. 3; Tr. 1446). He contacted Huntington and asked to be connected manually by modem to the Huntington terminal so they could view data concerning these pages in Charleston (PRB Ex. 3, p. 3; Tr. 1446-7). At this point Stone left the room (Tr. 116, 1447). The connection was made but was broken at the Huntington end almost immediately (PRB Ex. 3, p. 3).

24. Wilson contacted Huntington again and told the engineers that he had been disconnected because someone in Huntington had to do something quickly (PRB Ex. 3, p. 3). They were reconnected and found that on the Huntington terminal the test function was disabled and there was no test pager number

displayed (PRB Ex. 3, p. 3). All the variables that needed to be entered were blank (Tr. 1448). The pager numbers, the repeat functions, the chaining functions had all been deleted (Tr. 1442). It would have been necessary to take several deliberate steps to delete all of this information, and Walker saw the deletion as an attempt to hide something (Tr. 1454-5). The engineers observed the activity function for about 30 minutes and saw no paging activity (PRB Ex. 3, p. 3). During this time Bogert returned to their vehicle and found that Capitol's tones had ceased (PRB Ex. 3, p. 3; Tr. 256).

25. Rusty Harrison, the Huntington manager, arrived and appeared not to have prior knowledge of the FCC engineers' presence (PRB Ex. 3, p. 4). He too found that the test paging function had been disabled and the test pager number erased (PRB Ex. 3, p. 4). He phoned Huntington and told Walker that his secretary had noted that test pages were being sent when she knew no one was in the field to receive the tests so she disabled the feature (PRB Ex. 3, p. 4). Harrison then recreated the test set up (PRB Ex. 3, p. 3). By this time Raymond had arrived but indicated he didn't know how the testing was accomplished or why it was there (PRB Ex. 3, p. 4; Tr. 1449).

26. The test set up transmitted to pager No. 1600, repeated that transmission, then transmitted to Nos. 1105 and 1106 in turn (PRB Ex. 3, p. 4). The numbers of the test pagers, 1600, 1105 and 1106 were associated with three pager numbers with the Account Name "Test" in the customer list provided to the

engineers (PRB Ex. 3, p. 4; PRB Ex. 5, p. 3; Tr. 1452). The "tone duration" was set to "4" which caused the first tone to be 1 second and the second tone, 3 seconds. The test consumed in excess of 20 seconds and was set to run each minute (PRB Ex. 3, p. 4).

27. The engineers requested a test using shorter tones and were told it would not work (PRB Ex. 3, p. 4; Tr. 117-8, 1456). They requested a demonstration and the tone duration was set to "2," to yield a tone duration of 0.4 and 0.8 seconds for the first and second tones, respectively (PRB Ex. 3, p. 4; Tr. 118). This would cause the entire test sequence to be sent in 7 seconds instead of 20 (PRB Ex. 3, p. 4). A test page was transmitted, but the pager they had been given did not receive it (PRB Ex. 3, p. 5; Tr. 118, 1456). They asked that the testing function be readjusted back to the original set up, a test page was transmitted, and again they did not receive it (PRB Ex. 3, p. 5; Tr. 118, 1456). Walker then asked for a working pager. They returned to the shorter tones, and this time the pager received the test (PRB Ex. 3, p. 5; Tr. 118). In Walker's experience, the shorter tones would more closely approximate a page in real life, but would be still longer than normal (Tr. 118-9).

28. Walker and Bogert noticed that the Morse code identification (ID) transmitted by Capitol was too slow, also taking up excessive air time, at 7 words per minute (wpm) instead of the required 20 - 25 wpm (Tr. 127-8; 256-7). They brought this to Capitol's attention, and Mike Raymond, Capitol's manager,

telephoned the manufacturer of the paging terminal that controlled the speed of the ID and discussed the setting of the switch that controlled the speed (Cap. Ex. 1, p. 19). He handed the phone to Bogert who spoke to the manufacturer and concluded that the switch might be in the fast position but the ID was still slow (Tr. 256-7, 271-3). After the phone conversation Bogert told Capitol they had a problem (Tr. 256-7, 272-3).

29. Raymond did not, however, correct the speed of the ID for nearly a year, after Capitol received a Notice of Apparent Liability from the Commission for the slow ID violation (PRB Ex. 12; PRB Ex. 13, p. 13). When questioned about this Raymond recalled Bogert's statement that the switch seemed to be set right. He also recalled that the engineers told him that the Morse code was too slow. Raymond never, however, had someone time the Morse code (Tr. 1034-6, 1348, 1354). At the hearing he said he could not remember the date when he corrected the Morse code speed until his attention was drawn to PRB Ex. 13, p. 13 (Tr. 1354-5, 1360-64). Capitol does not contest the slow Morse code ID violation (Cap. Ex. 1, p. 24).

"Testing"

30. Mike Raymond claimed that the tones observed by the engineers were testing (Tr. 1313). He said they were doing a lot of testing around August 1991 (PRB Ex. 11, pp. 1-3; Tr. 1310-12). The testing was for range, link, dependability, for individual customers -- the whole "pie" (Tr. 1311-13). He said, "it's a big piece of pie, and we don't pick a single piece of pie

out and say this is exactly what we're testing..." (Tr. 1312). They test regularly and have testing done all the time (Tr. 1314). The station "may work right now, it may work 20 minutes from now, but is it going to work an hour from now, is it going to work tomorrow," he said (Tr. 1322).

31. Raymond was repeatedly asked to identify a specific purpose for the testing he said he was doing around August of 1991 (Tr. 1311-7, 1418-20):

Q Well, in August of 1991 was there a specific reason that you were conducting tests?

A It would be that pie that I'm discussing (Tr. 1312).

* * * * *

Q And I would like to know what you were testing for.

A Okay.... We would be testing for range.... for dependability.... for link problems.... for, once again dependability....for individual customers. This customer says, I... need this area,... but if we don't know if [it] works there, we have to go find out (Tr. 1313).

* * * * *

Q (Judge Chachkin) [W]hat was the reason for that particular testing?

A We used the tones to test for all that I had stated prior to. We prefer to use tones to do our testing... (Tr.1314).

* * * * *

Q What I'm trying to determine is in August of 1991, during those... days that the engineers were in town, do you know specifically why you were testing the system?

A I'm sorry, I, I thought I've answered that.

Q I think you've indicated that you test for a number of reasons. I would like to know what you were testing on those days.

A All those numbers of reasons or any of those number of reasons, ma'am. I cannot go back and specify that particular day, or even yesterday, because different people, different staff, different of our associates will test for different things, depending on what they are requiring at that specific time... (Tr. 1316).

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Q (Judge Chachkin) [I]f you only had two customers, the question is why were you doing so much testing in August, 1991?....

A We were doing the amount of testing hopefully, once again, to determine the pie that I spoke of, these are the dependability the range....

Q And the question is why was it necessary to, to do all this testing, in light of the [paucity] of customers you had at this point?

A Simply because we could not get customers on due to the fact of the, the problems with the link and the problems of interference or being walked over... (Tr. 1418-20).

In sum, Raymond repeatedly declined to identify a specific purpose for the testing (Tr. 1311-7; 1418-21).

32. In a statement executed under penalty of perjury on June 17, 1992, Raymond addressed the testing during the August 12-15, 1991, period (PRB Ex. 11, p. 3). His statement was Capitol's response to the Commission's May 19, 1992, request for information pursuant to Section 308(b) of the Communications Act (PRB Ex. 10, p. 2, Q. 4). Raymond said, "Tests were being conducted daily. To test, we were using a pager in different areas throughout our paging area.... Russell Harrison, our manager in Huntington, WV was conducting the test.... [H]e inadvertently forgot to turn the testing capability off" (PRB Ex. 11, p. 3). Raymond also addressed the testing in his September 29, 1992, statement under penalty of perjury attached to Capitol's September 30, 1992, response to the Commission's July 30, 1992, NAL (PRB Ex. 13, pp. 11-4). He denied causing interference to RAM and contended the testing was legitimate (PRB Ex. 13, p. 12).

33. Rusty Harrison, Capitol's Huntington manager, testified that, in 1991, he would have the autotest feature of the paging terminal put on from time to time during late afternoon so he could check system coverage during his drive home from Huntington to Charleston (Cap. Ex. 22, p. 4; Tr. 734). There are two main

routes between Huntington and Charleston, according to Harrison (Tr. 737). He testified that on one occasion during this period his secretary forgot to call Charleston to have the testing turned off and it ran all night (Cap. Ex. 22, p. 4). It only happened once (Tr. 731-2). He denied ever sending out tones continuously for a 24 hour period (Tr. 696-7, 704-5). Harrison's testimony at the hearing was a reiteration of his September 29, 1992, statement under penalty of perjury attached to Capitol's September 30, 1992, response to the NAL (PRB Ex. 13, pp. 16-9). Harrison's September 29, 1992, statement was reaffirmed and included in his written direct testimony (Cap. Ex. 22, pp. 2-5).

34. Although asked repeatedly whether someone was receiving the tests that the engineers had heard at all hours of day and night, Raymond did not identify anyone (Tr. 1318-9):

Q [D]o you need to have somebody out with paging receivers to conduct a test?

A Well, someone would need to be receiving something.... Would I need someone out particularly, not necessarily, but someone needs to be out whether it be an employee or possibly even a customer. We have had... [both RCC and PCP customers]... say can you put my pager on test, I'm going to go in these areas. [T]his is not... well-known to the customers, but we have certain customers that we will allow that for....

Q Now you remember that the engineers testified that they would listen to these tones whenever they were in the car over the four day period at all different times of day and night?.... Did you have somebody out receiving those pages during all those different times?....

A. Did Capitol? I do not know because, once again... I do not know. I did not require that, I did not say go out and test this on this particular day or this. If it was tested, most likely there was someone receiving those pages.... Could it be done at nine o'clock at night, and, and I think... I explained that our, our associates, our sales people... their job is to sell during the day and that's hopefully 9:00 to 5:00... so during their testing, even though they can test in the day, in the car, okay, it's not

uncommon, that... they would do that in the evening's hours, as my recollection serves Mr. Harrison said he would do it on the evenings going home (Tr. 1317-9).

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Q (Judge Chachkin) I believe there was testimony from the inspectors to the effect that when they were there, testing was going on at midnight or late at night?.... Could you tell me what was, that was all about?

A No, sir, I do not know if they said midnight or whatever, However, if it was being done at 8:00, I can very easily see testing being done at 8:00, 9:00, and maybe even as late as 10:00 in the evening hours. As I say, the people would then go out after their work and do testing. They may be doing replacements, repairs, running to other areas. And... [if] I was that sales person, I may be going out to give a replacement pager to an area and have the testing unit turned on so while I'm doing that, I'm testing rather than listening to, to the local radio station (Tr. 1422).

In sum, except for referring to Harrison's testimony that he would receive tests on his drive home, Raymond did not identify anyone who was receiving the tests (Tr. 1317-20). He did not require anyone to receive tests at a particular time (Tr. 1319). Instead, he suggested that the tests might be received voluntarily by customers or, in the evening, by sales people on their way home or by repair people on their way to a job (Tr. 1318-9, 1422).

35. Raymond stated that they almost always use the automatic test feature of the paging terminal (Tr. 1319-20). It can be set to send pages out at intervals of from one to 99 minutes (Tr. 1317). To use a cellular phone to call in a page from a test location in the field costs 60 cents a page, which is too expensive (Tr. 1317).

36. Raymond testified about the particular test set up that the FCC engineers had observed (Tr. 1327-32). When asked about the length of the tones, he said they tried shorter tones, which

gave less reliability (Tr. 1327). If they were out to do something wrong, they could have chosen a much longer tone length (Tr. 1327). Harrison, however, recalled that the tone length on the autotest feature could be set from "1" to "4" (Tr. 738-9). The setting on the test set up observed by the engineers was the maximum, "4" (PRB Ex. 3, p. 4).

37. When asked why the message to the first pager was transmitted twice, Raymond explained it in terms of his wife, who carries a voice pager in her purse. When it goes off she holds the purse up to her ear. The message may not come through clearly and a repetition is helpful (Tr. 1330). When asked why the test went to two additional pagers, he said that the test could then go to three people in different areas at once, thus doing the testing three times faster (Tr. 1332). Also, he alluded to problems experienced by Harrison in chaining, and said they wanted to check the PCP's chaining ability (Tr. 1332).

38. At the hearing Raymond testified that at one time, it was necessary for Huntington to call Charleston to control the test paging function (Tr. 1023-4). Now they have a new computer system that allows remote operations between Charleston and Huntington and allows Huntington to do their own programming (Tr. 1024, 1026-7). He said the new system cost close to \$100,000 (Tr. 1401). He testified that he could not recall whether the new system was in operation at the time of the inspection in August 1991 (Tr. 1024). Later, he made further reference to the new computer system, stating that "it was just recent" that they